FILED
OCT 19 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-465

In The

Supreme Court of the United States

October Term, 1998

KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner,

vs.

DARRELL DARDEN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Twenty-Second Judicial District Court for the Parish of Washington, State of Louisiana

RESPONDENTS' BRIEF IN OPPOSITION

GERALD E. MEUNIER*
GAINSBURGH, BENJAMIN, DAVID, MEUNIER & WARSHAUER
Plaintiffs' Liaison Committee, appearing for Respondents
2800 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
(504) 522-2304

**Counsel of Record* *(Continued)*

149194

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

REGINALD J. LAURENT
Plaintiffs' Liaison Committee, appearing for Respondents
3843 Coventry Street
Slidell, Louisiana 70458
(504) 847-1657

STEPHEN B. MURRAY
Plaintiffs' Liaison Committee, appearing for Respondents
Murray Law Firm
909 Poydras Street, Suite 2550
New Orleans, Louisiana 70112
(504) 525-8100

DANIEL E. BECNEL, JR.
BECNEL, LANDRY & BECNEL
Plaintiffs' Liaison Committee, appearing for Respondents
P. O. Drawer H
Reserve, Louisiana 70084
(504) 536-6445

PARTIES TO THE PROCEEDING

Respondents do not dispute the accuracy of petitioner's Rule 29.6 statement as to itself and as to other defendants in the proceeding below.

However, it is not correct, as petitioner represents, that the named respondent Darrell Darden "is one of twenty-three named plaintiffs and putative class representatives." In the judgment of the district court certifying this matter as a class action, only sixteen of the originally-named plaintiffs and class representatives were confirmed as representatives of the plaintiff class, and Mr. Darden is not one of them. A copy of the district court's certification judgment, dated November 10, 1997, is attached as Appendix A.

TABLE OF CONTENTS

Page

Parties to the Proceeding i

Table of Contents ii

Table of Cited Authorities iv

Statement of the Case 1

Opposition to Petitioner's Statement of Jurisdiction .. 3

Reasons for Denying the Writ 4

I. KCS Was Not Entitled To Bring A Motion Under Article 965, After Denying — And Necessitating Extensive Discovery Concerning — The Very Allegations Of Fault In The Petition Which Now Must Be Deemed Admitted. 4

II. KCS Has The Burden To Demonstrate That Its Legal Right To A Dismissal Of All Claims Against It Is "Clearly Established". 8

III. Under Article 965, KCS Must Be Considered To Have Violated Multiple Provisions Of Louisiana Tort Law, As Well As Multiple Industry Rules And Government Regulations. 9

IV. KCS Has Misconstrued And Misapplied The Preemption Doctrine. 11

Contents

Page

V. This Court's Decision In Easterwood Supports Respondents' Position That This Is Not A Case For Preemption. 13

VI. Several Examples Suffice To Show That The C.F.R. Provisions Cited By KCS Cannot And Do Not Cover, Much Less Subsume, The Various Activities And Issues Made The Subject Of This Class Action In Tort. 19

VII. The Governing Jurisprudence Of Louisiana Is Consistent With Easterwood. 22

Conclusion 25

TABLE OF CITED AUTHORITIES

Page

Cases:

Abshire v. W. D. L. Investments, Inc., 428 So. 2d 1145 (La. App.), *writ den'd*, 433 So. 2d 161 (La. 1983) 5

Alexander v. Bates, 192 So. 2d 186 (La. App. 1966) .. 5

Beam v. Dudding, 443 So. 2d 73 (La. App. 1950) 8

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 3

CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993) 4, 13, 14, 15 16, 17, 18, 24, 25

CSX Transportation, Inc. v. Public Utilities Comm'n of Ohio, 901 F.2d 497 (6th Cir. 1990), *cert. denied*, 498 U.S. 1066, 111 S. Ct. 781, 112 L. Ed. 2d 845 (1991) 19

First Metropolitan Bank v. Plaia, 384 So. 2d 560 (La. App. 1980) 5

Freightliner Corp. v. Myrick, 514 U.S. 280, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995) 12

Haydel v. Hercules Transport, Inc., 654 So. 2d 418 (La. App. 1995) 22, 23, 24

Table of Cited Authorities

	Page
In re New Orleans Train Car Leakage, 671 So. 2d 540 (La. App. 1996)	24
Kiemele v. Soo Line R. Co., 93 F.3d 472 (8th Cir. 1996)	17
Michael v. Norfolk Southern Ry. Co., 74 F.3d 271 (11th Cir. 1996)	17, 18
Seay v. Wilson, 536 So. 2d 495 (La. App. 1988)	8
Smith v. Parker, 59 So. 2d 718 (La. App. 1952)	8
Southport Mill v. Friedrichs, 167 La. 101, 118 So. 818 (1928)	6
Southern Pacific v. Or. PUC, 9 F.3d 807 (9th Cir. 1993)	19
Strange v. Carraway, 159 La. 61, 105 So. 225 (1925)	6
Thomas v. Allstate Ins. Co., 367 So. 2d 1300 (La. App. 1979)	5
Statutes:	
15 U.S.C. § 1381 *et seq.*	12
28 U.S.C. § 1257	3

Table of Cited Authorities

	Page
28 U.S.C. § 1257(a)	3
49 U.S.C. § 5101 *et seq.*	22
49 U.S.C. § 5123	22, 23
49 U.S.C. § 5125(a)(2)	23
49 U.S.C. § 5125(b)	22, 23
49 U.S.C. § 5125(b)(1)	23
49 U.S.C. § 20101 *et seq.*	13, 14
United States Constitution:	
Article VI, U.S. Const.	11, 13
Rules:	
United States Supreme Court Rule 10	3, 4
United States Supreme Court Rule 10(c)	3
Other Authorities:	
23 C.F.R. § 646.214(b)(3)	15
23 C.F.R. § 646.214(b)(4)	15
23 C.F.R. §§ 655.601-603	15

Table of Cited Authorities

	Page
23 C.F.R. § 924	15
49 C.F.R. § 172	20
49 C.F.R. § 174.10	21
La. Code of Civ. Pro. Article 667.669	10
La. Code of Civ. Pro. Article 965	4, 5, 6, 7, 8, 9, 26
La. Code of Civ. Pro. Article 2315.3	1, 23
La. Code of Civ. Pro. Article 2317	10

APPENDIX

Appendix A — Judgment Of Division "C" Of The Twenty-Second Judicial District For The Parish Of Washington Of The State Of Louisiana Filed November 10, 1997 ..... 1a

Appendix B — Excerpts From Second Consolidated Amended Master Petition Filed July 2, 1997 ..... 6a

STATEMENT OF THE CASE

This class action arises out of a massive chemical release which occurred on October 23, 1995 when a railroad tank car ruptured at the premises of Gaylord Chemical Corporation in Bogalusa, Louisiana. The tank car had been loaded in Vicksburg, Mississippi with 110,000 pounds of a poisonous and hazardous chemical (nitrogen tetroxide or N204), and after loading had a total weight approximately 9,500 pounds in excess of the maximum safe gross weight stenciled on the car and prescribed for this type of car under industry standards.

The overloaded and overweight railcar then was moved by petitioner Kansas City Southern (KCS) from Vicksburg to Jackson, Mississippi, where it was transferred in interchange by KCS to another railroad, Illinois Central Railroad, before being taken to the Gaylord Chemical plant in Bogalusa. While situated at the plant, the nature and amount of the car's contents caused its rupture and the resulting chemical release.

The claims on behalf of the plaintiff class include not only many instances of severe personal injury caused by exposure to the chemical cloud which engulfed the entire community of Bogalusa and its environs, but also claims for the disruption of business activity, evacuation, and the fear and fright of the citizens who lived through this catastrophe. In addition, claims are made for the recovery of punitive damages, as specifically authorized under the provisions of Louisiana law which govern this litigation.[1]

---

1. KCS asserts in its brief that plaintiffs have "invoked widely divergent punitive damages statutes." *See* p. 3, Petitioner's Brief. In fact, the petition at hand is one taken only from a ruling in the Louisiana class action case, which is governed solely by the tort law of the State of Louisiana. Therefore, the only basis asserted in this case for the recovery of punitive damages is that set forth in Article 2315.3 of the Louisiana Civil Code, which requires proof that a plaintiff's injuries have been caused by a defendant's "wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances."

In July 1996, the Plaintiffs' Liaison Committee (PLC) appointed by the trial judge to organize and manage this case on behalf of the purported plaintiff class, filed a consolidated Master Petition, naming KCS as one of the defendants responsible for the catastrophe. In June 1997, the PLC filed a second consolidated and amended Master Petition, which essentially alleged the same fault on the part of KCS as was alleged in the original petition. KCS answered both petitions, most recently the amended petition in July 1997, and denied all of the pertinent allegations of fault made by plaintiffs.

At the same time, in July 1997, KCS filed a "Motion for Judgment on the Pleadings," a motion recognized under the Louisiana Code of Civil Procedure as essentially the equivalent of common-law demurrer. KCS sought thereby a dismissal of the entire action against it on the basis of preemption. In considering such a motion, however, the Court is not permitted to review any evidence or facts beyond the pleadings, even though in this case substantial discovery pertinent to the specific fault of KCS had taken place in the roughly one-year period since the filing of the original petition.

Following briefs by the parties and oral argument, the district judge denied the KCS motion, and entered judgment to this effect on October 31, 1997. On April 6 1998, a unanimous panel of the First Circuit Court of Appeal denied the KCS application for a supervisory writ of review of this ruling by the district judge. The trial judge's ruling is not reviewable by appeal under Louisiana law, but only by such a supervisory writ. On June 19, 1998, the Louisiana Supreme Court, in a likewise unanimous decision, denied the KCS petition for a writ of supervisory review. The instant petition has followed.

OPPOSITION TO PETITIONER'S STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). Nothing in the language of that statutory provision, however, pertains to the situation at bar, or suffices to characterize the rulings appealed from below as reviewable by this Court on a petition for writ of certiorari. Moreover, Rule 10 of the Rules of this Court makes clear that review on a writ of certiorari is a matter of judicial discretion, not a matter of right, granted "only for compelling reasons." No such reasons exist for review in this case, consistent with the guiding language of Rule 10.

Petitioner suggests (in footnote 10 at pages 11-12 of its Brief) that this case fits the fourth category of matters subject to review under 28 U.S.C. § 1257, as set forth in this Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). But that category contemplates a situation in which the refusal to review an interlocutory state court ruling would "seriously erode federal policy." 420 U.S. at 483. In contrast, this is a case in which the only state court rulings at issue are to the effect that KCS is not entitled to preemption based solely on the generally-pled allegations of the petition. As will be discussed more fully *infra*, the narrow procedural tactic adopted by KCS in raising the preemption issue, effectively has limited the scope of what can be considered and reviewed on appeal, so that this Court itself has been deprived of the type of record suitable for review under 28 U.S.C. § 1257 and/or Rule 10. It is specious to suggest that the disposition of so limited a procedural motion has done anything to "seriously erode" federal policy.

KCS suggests that the "principal consideration" in regard to this Court's exercise of certiorari jurisdiction is based on Rule 10(c), which contemplates that a court below "has decided an important federal question in a way that conflicts with relevant

decisions of this Court." In truth, what the trial court decided below was that KCS was not entitled to have the entirety of this action dismissed based purely on the allegations in the Master Petition. Nothing in what has transpired below can be shown to conflict with any decision of this Court. Rather, as discussed more fully *infra*, the lower court rulings in this case have been entirely consistent with this Court's holding in *CSX Transportation Company, Inc. v. Easterwood*, 507 U.S. 658 (1993).

Finally, the argument by KCS that the judges below, like other Louisiana courts, "have misapplied *Easterwood*" (p. 19 of Petitioner's Brief), is an argument which undercuts the basis for asserted jurisdiction in this Court. Rule 10 expressly provides that

> [a] petition for writ of certiorari is rarely granted when the asserted area consists of . . . the misapplication of a properly stated rule of law.

REASONS FOR DENYING THE WRIT

I.

KCS WAS NOT ENTITLED TO BRING A MOTION UNDER ARTICLE 965, AFTER DENYING — AND NECESSITATING EXTENSIVE DISCOVERY CONCERNING — THE VERY ALLEGATIONS OF FAULT IN THE PETITION WHICH NOW MUST BE DEEMED ADMITTED.

It is respondents' position that the KCS motion raising preemption is one which was improper under Louisiana procedural law, and should not have been allowed.

Historically, the procedural device contemplated in Article 965 of the Code of Civil Procedure extended to plaintiffs only, and was intended to allow a plaintiff to move for relief in his

favor on the petition, after the defendant failed to oppose or deny the pertinent allegations therein. Eventually, the Article was broadened to extend to defendants as well, because of the need for a procedural device in their favor when they brought incidental demands in a main action. *See Official Revision Comment*, Art. 965, La. Code of Civ. Pro. A motion for judgment on the pleadings brought under Article 965, therefore, is one as to which "all allegations of fact in the adverse party's pleadings shall be considered true." *See* Art. 965, La. Code of Civ. Pro.

Conversely, where the allegations against a party in pleading are *denied* by that party, Article 965 loses its intended purpose; and, in such situations, relief under Article 965 is unavailable. Louisiana courts have unanimously held to this effect, reasoning that the denial of allegations in the adverse party's pleadings necessarily precludes the filing or consideration of a motion for judgment on the pleadings under Article 965. *See, e.g., Abshire v. W. D. L. Investments, Inc.*, 428 So. 2d 1145 (La. App.), *writ den'd*, 433 So. 2d 161 (La. 1983); *First Metropolitan Bank v. Plaia*, 384 So. 2d 560 (La. App. 1980); *Thomas v. Allstate Ins. Co.*, 367 So. 2d 1300 (La. App. 1979); and *Alexander v. Bates*, 192 So. 2d 186 (La. App. 1966).

Thus, in a case where the plaintiff sought a judgment on the pleading after the defendant had denied the allegations of those pleadings, the Louisiana Supreme Court denied the motion, stating that:

> [i]t does not appear that defendant has clearly and specifically admitted any of the allegations of plaintiff's petition upon which he [plaintiff] would be entitled to a judgment, either in whole or in part, for his claim. The issues between the parties are complicated and we do not find that the district judge acted arbitrarily in dismissing the rule for judgment [on the pleadings] so as to permit the whole

> controversy to be heard and determined at one time by the jury.

Strange v. Carraway, 159 La. 61, 63, 105 So. 225 (1925). *Accord*, *Southport Mill v. Friedrichs*, 167 La. 101, 118 So. 818, 820 (1928).

The strained nature of the procedural approach by KCS, seeking relief under this wrongly-invoked Article of the Code, is made all the more clear in the specific context of this proceeding. As noted *supra*, a full year passed between the time KCS was first named as a defendant, and the time this Motion for Judgment on the Pleadings was brought. In that period, KCS not only denied the allegations of the petition, but participated with all other parties in extensive "merits" discovery pertaining to its alleged fault. This engagement in the development of factual issues and disputes is inimical to Article 965, which contemplates that fact issues are non-existent and that the court is presented with a single decision, *i.e.*, whether one or the other party is entitled to judgment on the pleadings as a matter of law, both parties having agreed to the truth of what is pled, and there being no facts or evidence in discovery needed to further specify the allegations at issue. The preemption argument of KCS, in contrast, virtually necessitates an understanding of the specific aspects and theories of its alleged fault under Louisiana law. It thus is improper for KCS to seek preemption under an Article which precludes consideration of what already has been revealed in discovery as to its fault under state law, beyond the generality of the initial pleadings.

Since petitioner's method for raising the issue of preemption is procedurally flawed, and flawed in a way which precludes intelligent focus on the specific, discovery-supported claims of state law liability as to this railroad, this Court is not presented with a legitimate ground for certiorari jurisdiction. The only approach made possible by virtue of the motion brought by KCS, is one in which all specifications of KCS fault reasonably inferable

from the general subject matter of the allegations first must be conjured, and then reviewed in the light of federal regulations which may or may not be germane, depending on facts not known to the Court. KCS cannot plausibly limit the Court's scope of knowledge as to the underlying specifications of fault, and then seek to take advantage of this limited knowledge by matching the subject matter of broad allegations to the subject matter of certain potentially-applicable sections of the Code of Federal Regulations.

In the same way, it is clear that KCS cannot plausibly complain about the trial judge's observation at oral argument of the motion that preemption would not lie as long as there were any allegations by plaintiffs which, on their face, were not subject to preemption. KCS apparently feels that this observation is too sweeping, and that perhaps it was entitled to *partial* relief, if not full relief, by having the trial judge consider the possibility that certain claims might be preempted, and other claims not preempted. But KCS, not the trial judge, is responsible for painting this preemption analysis with a broad brush of generalization; and the fact is that the procedural device invoked herein for the consideration of the preemption issue does not allow partial relief (as distinguished, for example, from a summary judgment motion addressed to specified claims). KCS raises preemption by means of a motion which by nature seeks a *complete* dismissal of the action against the defendant on the basis that *all* of the plaintiff's allegations, even if admitted true, do not form a legal basis for recovery from the defendant. Partial summary judgment was not sought and is not under review. KCS chose to pursue an "all or nothing" approach below. Under Article 965, the trial judge's observation — like her ruling — was entirely proper and correct.

II.

KCS HAS THE BURDEN TO DEMONSTRATE THAT ITS LEGAL RIGHT TO A DISMISSAL OF ALL CLAIMS AGAINST IT IS "CLEARLY ESTABLISHED".

The similarities between the standards governing motions for judgment on the pleadings and motions for summary judgment are recognized in Louisiana jurisprudence. *See Seay v. Wilson*, 536 So. 2d 495 (La. App. 1988). A judgment can be granted in either case only "as a matter of legal right," and only in the absence of factual issues bearing upon same. *See id.* At 498. The guidelines for both types of motions, therefore, make it clear that the movant can prevail "only when the legal right [asserted by the motion] is clearly established" as a matter of law. *Id.*

The petitioner's motion below was properly denied if only because fact issues abound as to the specifics of the claims of tort liability asserted against it.

In deciding a motion under Article 965 (as in the case of a summary judgment motion under Article 966), the trial court has broad discretion. *See, e.g., Smith v. Parker*, 59 So. 2d 718 (La. App. 1952). For this reason, the refusal to render a judgment on the pleadings under Article 965 is not subject to review on appeal. *See Beam v. Dudding*, 443 So. 2d 73 (La. App. 1950).

III.

UNDER ARTICLE 965, KCS MUST BE CONSIDERED TO HAVE VIOLATED MULTIPLE PROVISIONS OF LOUISIANA TORT LAW, AS WELL AS MULTIPLE INDUSTRY RULES AND GOVERNMENT REGULATIONS.

The PLC's Second Consolidated Amended Master Petition (excerpt attached as Appendix B) contains the following allegations, which for present purposes must be considered factually true and admitted:

1. KCS "stored, handled, and/or transported" the hazardous and toxic chemicals involved in this litigation [¶18];

2. KCS accepted, shipped and turned over to Illinois Central Railroad a tank car which at that time was in an "overweight and/or defective condition" [¶42];

3. KCS failed to "account and prepare" for the various "hazards" involved in the "storage, handling and transportation" of the hazardous material contained in this railroad tank car [¶¶40(a) and 41];

4. KCS failed to "discover or repair" certain "damage or defects" in the railcar, and also failed to properly "inspect, test, maintain, or equip" the car [¶¶40(b)&(c) and 41];

5. KCS failed as an employer to properly screen, select and hire persons of skill and competence to perform services with respect to this railcar [¶¶40(f) and 41];

6. KCS failed to develop a proper protocol for a response to the hazardous chemical emergency involved in this litigation [¶¶40(g)&(l) and 41];

7. KCS failed to abide by not only federal laws and regulations, but also state and local laws and regulations, industry-wide practices, and internal standards and procedures [¶¶40(j)&(k) and 41];

8. KCS had care, custody and/or control of a dangerous railcar, within the meaning of Article 2317 of the Louisiana Civil Code [¶43];

9. KCS caused or allowed the "unauthorized leaks of toxic and hazardous vapors, fumes, and chemical materials," in violation of Louisiana Civil Code Articles 667-669 [¶47]; and

10. KCS caused harm in the conduct of an "ultra hazardous activity" within the meaning of Louisiana's absolute liability law [¶48].

Based upon such admitted factual indicia of wrongdoing, KCS cannot now suggest to this Court that it has "only the most tangential connection to the chemical release . . ." (pp. 3-4, Petitioner's Brief), and that it played on "obviously minimal" role in the catastrophe (p. 22, Petitioner's Brief). On the contrary, its extensive involvement must be conceded, as pled, in order for it to bring its motion for dismissal on the pleadings. Moreover, petitioner's acceptance, movement and transfer of a dangerously overloaded and overweight hazardous materials railcar *was* central in the events leading up to the chemical release. Before ever accepting and moving this railcar, KCS received from Vicksburg Chemical, the shipper which had loaded the car, a bill of lading which clearly revealed the car to be overloaded, overweight, and therefore unsafe for movement and delivery to Gaylord. KCS nonetheless accepted and moved the railcar. The problem with the car remained undiscovered and unaddressed, enabling the eventual catastrophe.

Both legally and factually, petitioner is in no position to characterize itself as less than a major tortfeasor in this case.

IV.

KCS HAS MISCONSTRUED AND MISAPPLIED THE PREEMPTION DOCTRINE.

In raising preemption as it has, KCS appears intent on trying to find advantage in the generality of the language used in the plaintiffs' petition, apparently arguing that any identity of subject matter between these general allegations and that which is covered by federal railroad regulations, entitles it to preemption. In truth, the opposite holds. The very generality of these allegations fundamentally discounts the railroad's position, since any and all plausible, factual activity referred to in the plaintiffs' generally-pled allegations may form a basis for liability under state law; and, procedurally, all factual allegations from which the more specific claims are inferable, must be deemed admitted.

The federal regulations to which KCS refers do not constitute a comprehensive "federal blanket" of immunity, covering *in toto* each and every conceivable, tortious activity for which this railroad is sought to be held accountable under Louisiana tort law.

It is KCS, therefore, which has misunderstood and misapplied the doctrine of preemption. The foundation for preemption is the "Supremacy Clause" of the United States Constitution, which provides that federal law shall be "supreme," any state law *to the contrary* notwithstanding. *See* Article VI, U.S. Const. The ultimate question for this Court must be whether a specific provision of federal law would be impeded or frustrated if otherwise applicable state tort law were given effect. But petitioner can make no showing that any state law claims or theories of liability asserted by the PLC would either frustrate in some way, or conflict with, specific federal regulatory provisions or standards, even though this is the

very tension which lies at the heart of preemption. It is not enough to suggest that uniform federal regulations exist in the general area of railroad or railcar safety. KCS instead must show that the Louisiana tort law *invoked in this case*, would specifically operate to impede or impair a federal regulatory provision. This is the proof needed for preemption, but it has not been made by KCS for the simple reason no such proof exists.

Preemption is available as a defense to state tort claims only when an established presumption in favor of the application of state law is overcome; and, in cases of "express preemption" (such as KCS seeks to make here), this presumption is overcome only through a clear, unequivocal manifestation of Congressional intent to set aside sovereign state law. That manifestation is utterly lacking herein, with respect to the Louisiana tort law on which plaintiffs base their case.[2]

---

2. In its brief (at pages 21-22, fn. 17), KCS also suggests that federal regulation of railroads is so extensive as to warrant an across-the-board doctrine of *implied* preemption of all state tort law in cases against railroads. In *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995), state common-law claims against the manufacturers of certain tractor trailers were held not impliedly preempted by the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. § 1381 *et seq.*), because, among other things, a finding of liability under state law in no way would undermine or conflict with the federal objectives or purposes with respect to the regulated equipment in question. For the purpose of implied preemption, as well as express preemption, it therefore continues to be the underpinning of judicial analysis that some demonstrated frustration of federal interest will result from the operation of state law. Without this, the rationale for preemption ceases to exist, and the presumption against preemption is not overcome.

V.

THIS COURT'S DECISION IN EASTERWOOD SUPPORTS RESPONDENTS' POSITION THAT THIS IS NOT A CASE FOR PREEMPTION.

In *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993), a wrongful death case brought by the widow of a truck driver who was fatally injured in a collision with a CSX train at a railroad crossing in Georgia, plaintiff alleged that under Georgia tort law the railroad was negligent for: (1) failing to maintain adequate warning devices at the crossing; and (2) operating the train at an excessive speed. The defendants sought summary judgment on the ground that these claims were preempted under the Federal Railroad Safety Act [FRSA], 49 U.S.C. § 20101 *et seq.*

This Court articulated both the underlying rationale of the preemption defense in cases where state tort law is sought to be applied, and the established presumption against displacing such law on the basis of preemption. The concept of preemption, the Court noted, derives from the "Supremacy Clause" in Article VI of the United States Constitution, pursuant to which a state law which "conflicts with or frustrates federal law . . . must give way"; and

> [i]n the interest of avoiding unintended encroachment on the authority of the States . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption. Thus, preemption will not lie unless it is "the clear and manifest purpose of Congress."

507 U.S. 663-64 [citation omitted].

Against this important conceptual backdrop, the Court in *Easterwood* based its analysis on the express text and structure of the FRSA as paramount indicators of Congressional intent. It observed that the stated purpose of the Act was to generally promote railroad safety through a directive that the Secretary of Transportation prescribe appropriate rules, regulations, orders, and standards for same, but with the express acknowledgment that each State was free to enact and enforce its own laws or standards pertinent to railroad safety, "until such time as the Secretary has adopted a rule, regulation, order or standard *covering the subject matter* of such State requirement. . . ." 49 U.S.C. § 20106.

The decision in *Easterwood* therefore hinged on the interpretation of the statutory phrase "covering the subject matter" (of state law). This Court's balanced and well-reasoned interpretation should continue to govern, and it is worth noting *verbatim*:

> To prevail on the claim that the regulations have preemptive effect, petitioner must establish more than that they "touch upon" or "relate to" that subject matter. . . . , for "covering" is a more restrictive term which indicates that *preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law*. . . . The term "covering" is in turn employed within a provision that displays *considerable solicitude for state law* in that its express preemption clause is both prefaced and succeeded by express saving clauses.

507 U.S. 664-65 [emphasis added].

Georgia's tort law provided that railroads had a continuing duty to provide for safe public passage at railroad crossings. *See* 507 U.S. 665 n. 5. The Secretary of Transportation likewise had promulgated a series of federal regulations governing the use of

specified warning devices at crossings, some of which were explicit in defining and categorizing "warning devices." *See id.* at 672 n. 11. But in scrutinizing different sections of these regulations (codified in Title 23 of the C.F.R.) as potential sources of preemption, the Court in *Easterwood* found that none had displaced Georgia's tort law in the case. Specifically, the provisions of 23 C.F.R. § 924 had "little to say about the subject of negligence law," and were actually complemented by a state scheme of tort liability (507 U.S. at 667-68); the provisions of 23 C.F.R. §§ 655.601-603 (a uniform manual on traffic control devices) made no effort to prescribe "an alternative scheme of duties incompatible with . . . Georgia negligence law" (507 U.S. at 670); and the provisions of C.F.R. §§ 646.214(b)(3) and (4), while potentially preemptive of competing state law claims regarding the installation of warning devices, did not apply in the absence of federal funding for the crossing in question (507 U.S. at 670-73).

Hence, federal regulations well might *deal with* warning devices at crossings, but still did not *subsume* this subject matter to preclude application of a state tort claim addressed to warning devices at crossings. The critical aspect of this analysis reflects the purpose of preemption, i.e., to set aside state law which competes with and frustrates applicable federal law.

At the same time, there were in *Easterwood* applicable C.F.R. provisions establishing a safe maximum and allowable speed for trains, according to the "class of track" on which a train traveled. The maximum speed under these regulations was sixty miles per hour. Plaintiff conceded that the train in this case was traveling at a lesser speed, but contended that it nonetheless was going fast enough to violate the railroad's duty under state tort law to operate the train at a "moderate and safe rate of speed." 507 U.S. at 673. As distinguished from the issue of warnings devices at crossings, this was an instance in which the plaintiff sought to invoke state tort law in a way which would directly conflict with and contradict the "safe" speed specified in applicable federal regulations. It was

precisely because such an attempted reliance on state tort law would be "incompatible with the FRSA and the Secretary's regulations," that Georgia's tort law regarding a safe train speed necessarily yielded on the basis of preemption. *See id.* at 675.

Notably, even this finding of preemption as to the plaintiff's speeding claim was not considered in *Easterwood* to be preemptive of other possible "related" tort claims of unsafe train operation. The defendant CSX even conceded in the case "that the preemption of [the] excessive speed claim does not bar suit for breach of related tort law duties, such as the duty to slow or stop a train. . . ." 507 U.S. at 675 n. 15. Accordingly, the Court made clear that

> this case does not present, and we do not address, the question of FRSA's preemptive effect on such related [tort] claims.

Id. Such "related" tort claims, in other words, might well deal with the *subject area* of train movement or operation; but federal regulations only *subsumed* the subject so as to justify preemption if such state law was incompatible with a specified regulatory standard for the precise activity or conduct at issue.

Respondents therefore submit that the holding of *Easterwood* actually supports the result reached in the rulings of the trial and appellate courts in this matter. *Easterwood* holds that:

(a) express preemption based upon federal statutory language generally is available only in narrow circumstances where there is a "clear and manifest" Congressional intent or purpose to preempt state tort law;

(b) the FRSA is preemptive of state tort law *only* to the extent federal law or regulation *substantially subsumes* and occupies the subject of the state tort law in question, as opposed to simply "dealing with" or "touching upon" that subject matter; and

(c) express preemption under the FRSA is further reserved for cases in which there is an attempt to apply state tort law in a way which frustrates, contradicts, or is in conflict with, federal law or regulatory interests.

Recent federal appellate jurisprudence also illustrates the proper application of *Easterwood* so as not to justify preemption herein.

In *Michael v. Norfolk Southern Ry. Co.*, 74 F.3d 271 (11th Cir. 1996), the Eleventh Circuit reversed a lower court ruling that the plaintiffs' claims for negligent maintenance of a railroad crossing and for failure to warn the public of the defective nature of the crossing, were preempted under certain federal regulations which dealt with the subject matter of rail crossings. It did so because the regulations dealt "with the design and installation of new warning devices, not the maintenance of those devices or the failure to warn the public of defective devices." *Id.* at 273.

Similarly, in *Kiemele v. Soo Line R. Co.*, 93 F.3d 472 (8th Cir. 1996), the defendant railroad asserted that "any claim" under state law dealing with "the sufficiency of warning" at crossings, was preempted federally. However, the Eighth Circuit disagreed, stating that the railroad's state law duty of care was viable in requiring that warning devices be actually installed and operating at the time of the incident causing injury. *See id.* at 475-76.

Under the KCS interpretation of *Easterwood*, such cases would have resulted in preemption simply because the state tort law invoked dealt with the same subject matter (railroad crossings) as do certain detailed federal regulations. However, as *Easterwood* and its jurisprudential progeny make clear, the FRSA's preemption language cannot be so broadly interpreted or applied.[3]

---

3. As noted, the lack of federal funding for the crossing involved in *Easterwood* was controlling as to the applicability and preemptive effect of (Cont'd)

In the case at hand, the plaintiffs' tort law claims against KCS do not conflict with, or establish incompatible duties or standards of conduct when compared to, any of the federal regulations cited by defendants. Neither do any of these federal regulations evidence a "clear and manifest" intent by Congress or by the Secretary of Transportation to totally preclude the applicability of state tort law. The fact that certain federal regulations may deal with or touch upon the areas of railroad safety to which Louisiana tort law also is sought to be applied in this case, clearly is not sufficient for preemption under the FRSA, as interpreted by *Easterwood* and its progeny. Rather, KCS must show that a specific Louisiana tort law claim conflicts with a federal regulation in an area or on a subject substantially subsumed by that federal regulation. If so, the application of state tort law would frustrate and conflict with that federal regulation. Otherwise, as in this case, preemption does not occur.

The Louisiana tort law claims herein, not unlike the Georgia tort law claims in *Easterwood* dealing with warnings at railroad crossings, actually are in harmony rather than in conflict with whatever federal regulations may apply to the various subject areas

---

(Cont'd)

certain federal regulations. Interestingly, however, in both *Michael v. Norfolk Southern Ry. Co.*, and *Kiemele v. Soo Line R. Co.*, *supra*, federal funding *was* involved with the crossing devices at issue. Nonetheless, both the Eighth and Eleventh Circuits in these cases applied *Easterwood* to preclude preemption of the plaintiffs' state law claims, because those claims were distinguishable in effect from the specific thrust and targeted conduct of the federal regulation (*e.g.*, the allegedly negligent *maintenance* of crossing devices, as opposed to the design and installation of same, as in *Michael*).

Petitioner herein thus fails to recognize the fundamental principle of preemption, pursuant to which it is not the mere existence or applicability of federal regulations in a subject area which justifies preemption, but the demonstrated incompatibility of applying state tort law in a way which conflicts with a federal regulatory provision.

of railroad safety. Louisiana tort law does not operate to *regulate* in these areas, in competition with the regulatory scheme of the C.F.R. No differing standards of activity or conduct are sought to be imposed. There is no tension by virtue of state law operating to frustrate federal law in an area subsumed by federal law; and, hence, there is no preemption as intended under the FRSA. *Compare CSX Transportation, Inc. v. Public Utilities Comm'n of Ohio*, 901 F.2d 497 (6th Cir. 1990), *cert. denied*, 498 U.S. 1066, 111 S. Ct. 781, 112 L. Ed. 2d 845 (1991) [FRSA preemption of a concurrent and comprehensive state regulatory scheme for hazardous materials transportation] *with Southern Pacific v. Or. PUC*, 9 F.3d 807 (9th Cir. 1993) [*no* FRSA preemption of Oregon regulations dealing with the *use* of train whistles, notwithstanding C.F.R. regulation as to the sound-producing *capacity* of train whistles].

VI.

SEVERAL EXAMPLES SUFFICE TO SHOW THAT THE C.F.R. PROVISIONS CITED BY KCS CANNOT AND DO NOT COVER, MUCH LESS SUBSUME, THE VARIOUS ACTIVITIES AND ISSUES MADE THE SUBJECT OF THIS CLASS ACTION IN TORT.

Again because of the procedural irregularity of its vehicle for raising the preemption issue, KCS purposefully does not invite this Court to refer to the specific aspects or details of plaintiffs' case against it, as revealed in discovery. Instead, it attempts to "match" the subject matter of generally-pled allegations with the subject matter of various C.F.R. provisions, and from this "matching," seeks to conjure a case for preemption. Incredibly, KCS also asserts that a general allegation of "negligent fault" in one paragraph of the Master Petition should be disregarded, because it is so vague as to not be "susceptible to preemption analysis." *See* Petitioner's Brief at p. 15, fn. 13. In this way, KCS would like to hide beyond the permissive generality of the pled allegations only when it finds it helpful to do so.

A few obvious examples nonetheless suffice to demonstrate how the activities made the subject of this tort case against KCS do not logically or conceivably fit entirely under some "umbrella" of incompatible and preemptive federal railroad regulation.

The allegations in paragraphs 40(f) and 41 of the petition that KCS failed to properly "screen, select and hire" employees and contractors, are, according to KCS, preempted because of certain federal regulations (49 C.F.R. § 172) regarding the training of hazardous material employees. *See* Petitioner's Brief at pp. 7-8, fn. 5. But there is absolutely no basis for suggesting that federal regulatory provisions for the training of "hazmat" employees, "substantially subsumes" the entire subject area of how a railroad *screens*, *selects* and *hires* — as opposed to *trains* — any number of individuals (whether employees or independent contractors) whose incompetence may have contributed to the catastrophe in this case. For example, how KCS screens and selects those individuals who process bills of lading, has nothing whatsoever to do with how it may train "hazmat" employees.

It is further alleged, in paragraphs 40(j) and (k) and 41 of the petition, that KCS failed to follow both industry-wide and company practices in the handling and transportation of N204. KCS presumably believes this claim is preempted by some or all of the various provisions it cites in Title 49 of the C.F.R. *See* Petitioner's Brief at pp. 7-8, fn. 15. However, to infer from this general plaintiffs' allegation an example pertinent to this case, i.e., that the railroad's failure to follow safe practices consisted, among other things, of ignoring critical overweight information on a bill of lading in its actual possession before it accepted and moved the loaded railcar, is to specify a claim that the railroad knew or should have known that this railcar was overloaded and weighed approximately 9,500 pounds more than the stenciled and published "gross weight on rail" limit for this car. Specific written standards, not promulgated by the federal government but by the industry organization to which KCS subscribes (the American Association

of Railroads, or AAR), absolutely prohibit the movement and transfer of such an overloaded and overweight car. The company policy of KCS also prohibits this. But there are *no* C.F.R. provisions specifying an alternative, much less incompatible, standard of conduct in regard to this particular subject matter or activity. Hence, one of the most important theories of fault alleged by plaintiffs, focused on the fact that this railroad should have refused to move a railcar shown to be overweight in the bill of lading it had received from a shipper, is in no way covered, "subsumed," or preempted by the provisions of the C.F.R.

A related issue in this litigation is the alleged negligence which occurred in "interchange," when KCS transferred the overloaded railcar to Illinois Central in Jackson, Mississippi. To assert preemption in this area, KCS apparently cites 49 C.F.R. § 174.10, a regulatory provision which deals with the inspection of leaking railcars during interchange. *See* Petitioner's Brief at p. 7, fn. 5. Again, if the specific fault arises from KCS turning over to another railroad in interchange a car which was dangerously overweight and overloaded with hazardous materials, this is conduct as to which none of the cited regulations pertain, much less subsume through specific standards or provisions.

To proceed with other specific examples of why the state tort claims specifically being pursued herein are *not* preempted by the cited provisions of the C.F.R., would be a tedious and unnecessary exercise. In the final analysis, it is not plaintiffs' burden to give specific examples of fault under the generally-pled allegations in the Master Petition, in order to prove why this is *not* a case for preemption. KCS is the proponent of this extraordinary effort to achieve total immunity from the consequences of state tort law. *It* has the burden to demonstrate how any or all of the specific, asserted theories of liability under Louisiana law are incompatible with applicable federal regulations. Such a burden, however, is not satisfied by simply categorizing the broad language of plaintiffs' pleadings and noting that there are federal regulations

dealing with or touching upon some generally "matched" subject areas of railroad safety in regard to hazardous materials.

The underlying facts of this case, now well-developed through discovery, give life to the general allegations of the petition. Those facts make it clear that the federal regulations cited by KCS are silent as to the railroad's specific conduct made the subject of plaintiffs' claims of tort liability under Louisiana law. Since these specific claims of tortious liability condemn the petitioner's preemption argument, it is understandable why KCS has endeavored to conceal them from the Court through a discussion limited to general "subject matter." In doing so, however, the petitioner fails utterly to demonstrate the state-federal conflict and incompatibility necessary for preemption.

VII.

THE GOVERNING JURISPRUDENCE OF LOUISIANA IS CONSISTENT WITH EASTERWOOD.

In *Haydel v. Hercules Transport, Inc.*, 654 So. 2d 418 (La. App. 1995), claims for compensatory and punitive damages under Louisiana law were brought against the carrier of a hazardous substance released because of malfunctioning equipment on a tank truck. The defendant contended that certain provisions of the Hazardous Materials Transportation Act [HMTA], 49 U.S.C. § 5101 *et seq.* — and, more specifically, 49 U.S.C. §§ 5125(b) & 5123 — expressly preempted plaintiffs' state law claims for punitive damages under Article 2315.3 of the Civil Code. Echoing the weight of jurisprudential authority on preemption already discussed, the appellate court began by noting the premise of federal-state law *conflict* which lies at the heart of the preemption defense:

> The preemption doctrine has its roots in the Supremacy Clause of the United States Constitution (Article VI, clause 2), which invalidates state laws

> that "*interfere with, or are contrary to*" federal law [citations omitted]. Basic to this constitutional command is the notion that all state provisions which *conflict with* federal law are without effect [citation omitted].

654 So. 2d at 423 [emphasis added].

Due to the "basic assumption that Congress did not intend to displace state law," the court then proceeded to carefully scrutinize the purpose, language, and context of the HMTA. *See* 654 So. 2d at 424. In pertinent part, the statute provides for the preemption of "a law, regulation, order or other requirement of a State . . . that is not substantively the same" as regulatory provisions under the Act dealing with specified subject matters. 49 U.S.C. § 5125(b)(1). Under 49 U.S.C. § 5123, the Act set forth a civil penalty for violation of any of the provisions of HMTA.

Defendants in *Haydel* argued that the punitive damage claims under Louisiana law in the case were preempted in two ways: first, under the express language of Section 5125(b), this Louisiana law was "not substantively the same" as federal regulations on the subject of the handling of hazardous materials; and, secondly, the Act in Section 5125(a)(2) expressly preempted any state requirement that was "an obstacle to accomplishing and carrying out" the regulatory aims of the Act. The express purpose of the HMTA, however, was noted by the appellate court to be the protection of life and property against risks inherent in the transportation of hazardous materials, through the *regulatory and enforcement authority* of the Secretary of Transportation. *See* 654 So. 2d at 425. Article 2315.3 of the Civil Code, on the other hand, did not address this "regulatory and enforcement authority" of the Secretary, and neither did the Article seek to designate specific materials as hazardous, or regulate the transportation or handling of such materials. For this reason, Louisiana state law could not be seen as "substantively" different from, much less in conflict

with, the federal regulations promulgated under the HMTA. *See id.* at 425.

The Fourth Circuit Court of Appeal in Louisiana more recently has addressed the defense of express preemption under the FRSA, in a case somewhat factually similar to this one. *See In re New Orleans Train Car Leakage*, 671 So. 2d 540 (La. App. 1996). There, a class action seeking compensatory and punitive damages was brought against several carriers alleged to be responsible for the explosive release of butadiene from a leaking railroad tank car. The defendants sought preemption, and appealed from the trial court's denial of the summary judgment motions by which they raised this defense. Once again, the appellate decision noted that preemption extends only to situations in which state law interferes with or is contrary to federal law. *See* 671 So. 2d at 544. Moreover, consistent with the presumption against preemption, and in the interest of avoiding encroachment on the sovereign authority of the States, the defense of express preemption under a federal statute was seen as requiring close scrutiny of both the express text and the structure of the statute at issue. *See id.* at 545.

The court in *New Orleans Train Car* held that the FRSA would preempt only a state law claim which was shown to frustrate and conflict with a specific, federal provision of law. It properly observed the previously-noted reservation in the *Easterwood* opinion, whereby this Court recognized that even the preemption of the state law speeding claim did *not* bar a claim for the breach of "related tort law duties, such as the duty to stop or slow a train. . . ." Defendants ultimately were unable to make the requisite showing that Louisiana law claims for punitive damages in the case were in conflict with, or preempted by, any specifically, applicable regulations under the FRSA.

This Court properly denied *certiorari* in *New Orleans Train Car*. *See* 117 S. Ct. 512 (1996). It is a decision consistent with *Easterwood*, and correct in its result.

Thus, although KCS suggests that Louisiana jurisprudence generally has misapplied *Easterwood*, Louisiana courts consistently have followed the *Easterwood* analysis in deciding whether preemption is justified. To the extent a difference in purpose between federal regulatory and state tort schemes has been noted in the case law, it has been noted to illustrate the viable coexistence of these schemes where no federal interest is frustrated by sovereign state law. Petitioner apparently would prefer a different scenario, in which federal regulation of the railroad industry automatically negates any and all state tort law addressed or applied to the same general subject of railroad safety. So drastic view was not espoused by this Court in *Easterwood*, and certainly should not be endorsed now. Most fundamentally, it is not a view which finds support in any of the express Congressional enactments on which KCS has endeavored to build a case for preemption.

CONCLUSION

Nothing in the express language of the FRSA or the HMTA, and certainly nothing implied in the federal regulation of railroad or railcar activity, preempts the state tort law claims which are pursued against KCS in this matter. Any question whether this is so, surely is resolved by the interpretation, analysis, and holding of this Court in *Easterwood*, as well as the federal and Louisiana cases which consistently have applied *Easterwood*.

In the final analysis, KCS seeks total immunity through preemption because it perceives a "compelling need for uniform federal regulation." (Petitioner's Brief at p. 23). But if complete tort immunity through preemption were this easily justified, virtually every claim against a railroad now pending in the courts of this land, whether due to hazardous material leakages or railcar derailments, would be eliminated regardless of the merits. Federal railroad regulation *per se* does not usurp accountability under the tort law of the sovereign states on such a wholesale basis. Congress has not provided for this, and neither have the courts.

The thrust of this action in tort against KCS is not to *regulate* the railroad or railcar industry in competition or in conflict with the federal government. The thrust of this action is to seek damages for the violation of Louisiana tort law. The prospect that this — or any — railroad, in addition to being federally regulated, also might be held answerable under a state's tort law, surely has not been negated by the existence of numerous of federal regulatory provisions regarding railroad activity.

By simply showing that such regulations relate to or deal with some of the subject areas of railroad safety involved in this tort case, and that those federal regulations which do exist are meant to be uniform in nature, KCS does not — and cannot — make the showing which is a *sine qua non* of the preemption defense, namely: that a specific federal regulatory provision, interest, or law will be defeated, impeded, impaired, or in some way contradicted by holding this defendant responsible under the tort law of the community which has been damaged by its wrongdoing. Not a single theory or claim by plaintiffs has been shown to establish a standard of conduct for KCS which is incompatible with what KCS must do to comply with federal regulations. No showing of this essential element of preemption has been made by petitioner, and none can be made.

The courts below were correct in concluding that KCS's attempt at preemption through a Motion for Judgment on the Pleadings is without merit. KCS unquestionably has failed to carry its burden under Article 965 of demonstrating both a clearly established right to preemption as a matter of law, and the absence of factual issues pertinent to preemption. The narrowness and irregularity of raising preemption based only on generally-pled allegations, are themselves sufficient reasons for this court to decline the exercise of *certiorari* jurisdiction in this case.

This petition should be denied.

Respectfully submitted,

GERALD E. MEUNIER
Counsel of Record
GAINSBURGH, BENJAMIN,
DAVID, MEUNIER
& WARSHAUER
Plaintiffs' Liaison Committee,
appearing for Respondents
2800 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
(504) 522-2304

REGINALD J. LAURENT
Plaintiffs' Liaison Committee,
appearing for Respondents
3843 Coventry Street
Slidell, Louisiana 70458
(504) 847-1657

STEPHEN B. MURRAY
Plaintiffs' Liaison Committee,
appearing for Respondents
Murray Law Firm
909 Poydras Street, Suite 2550
New Orleans, Louisiana 70112
(504) 525-8100

DANIEL E. BECNEL, JR.
BECNEL, LANDRY & BECNEL
Plaintiffs' Liaison Committee,
appearing for Respondents
P. O. Drawer H
Reserve, Louisiana 70084
(504) 536-6445